



**United States District Court
Eastern District of Pennsylvania
Civil Action No. 02-CV-2733**

EXPERT REPORT

Prepared for:
Constellation NewEnergy, INC.

Prepared by:
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A handwritten signature in black ink that reads "Dan Violette". The signature is written in a cursive, flowing style. Below the signature is a solid black horizontal line.

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Information to other parties. Taken together, these allegations drive the estimates developed of Powerweb losses and economic damages.¹³

Each of these two contentions will be addressed separately below.

3.2.1 Use of the Energy Technology Information

The Expert Report by Dr. Fox-Penner develops estimates of damages based upon the assumption that NewEnergy inappropriately used Powerweb's technology. No specific allegations have been made, but based on the Expert Reports this seems to fall into three categories:

- Point 1) The fact that NewEnergy participated in ISO load response programs without including Powerweb.
- Point 2) That NewEnergy now offers a web-based energy information software program (WebJoules) free to customers rather than using Powerweb's Omni-Link[®] software.
- Point 3) Use of the Proprietary Concept of Curtailment Programs or Strategies.

3.2.1.1 NewEnergy Participation in Load Curtailment Programs as a Breach

The simple fact is that the ISOs have set out rules for participation in their load curtailment programs completely absent substantive influence by Powerweb. The rules for participation are clear, the business concepts are laid out, and the resulting contractual terms stem directly from the ISO program design and rules and from common contracting knowledge. NewEnergy is a member of the four ISOs that were examined by Dr. Fox-Penner and it is inconceivable that NewEnergy's participation in demand response working groups across all of these ISOs would not have revealed the ISO-directed processes for participation in their load curtailment programs. As a result, participation in any ISO program is completely independent of any interaction with Powerweb and, given the highly public nature of the stakeholder process among all these ISOs in program design, all of this information is, simply stated, common knowledge that would have come about whether Powerweb had existed or not. This industry developed independently through ISO processes that were developed to continue to use curtailable loads (as they have always been used) in the utility industry for capacity reserves and load management. This was not an industry that was pioneered, or even influenced by Powerweb and there are no unique, proprietary concepts developed by Powerweb that have influenced this industry.

In addition, there is ample evidence that NewEnergy was actively involved in seeking out load curtailments. Examples, among others, include:¹⁴

- 1) The letter sent from Mr. Harry Davitian of NewEnergy to Mr. Edward Kulik of the Water Street Corporation of New York City stating NewEnergy's offer to buy available capacity at \$30,000 per megawatt for installed capacity. This is a classic reserve capacity transaction.

¹³ Powerweb also is claiming damages arising from alleged interface with its contract with BG&E

¹⁴ All of this information comes out of the relevant depositions, or materials produced in this case.